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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

OHIO HOLDING COMPANY,
Petitioner

v.

P. E. MASHETER,
DIRECTOR OF HIGHWAYS,
STATE OF OHIO,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner, Ohio Holding Company, prays for a writ of certiorari to review the orders of the Supreme Court of Ohio entered February 28, 1974, overruling its motion to certify and dismissing its appeal of right from the judgment entered on October 29, 1973, by the Court of Appeals for Franklin County, Ohio, reversing the judgment of the Court of Common Pleas of Franklin County, Ohio, in Case No. 236,922.

OPINION BELOW

The Supreme Court of Ohio wrote no opinion. The Court of Appeals for Franklin County, Ohio, rendered a

written decision on September 4, 1973 (Appendix A, *infra*, pp. 23-39), which was not reported. Thereafter, on October 9, 1973, the Court of Appeals on reconsideration rendered a written unreported decision (Appendix B, *infra*, pp. 40-42), overruling the motion for reconsideration and adhering to its previous decision.

JURISDICTION

The orders of the Supreme Court of Ohio entered on February 28, 1974, overruling the petitioner's motion for an order directing the Court of Appeals for Franklin County, Ohio, to certify its records (Appendix C, *infra*, p. 43), and dismissing the appeal of right (Appendix D, *infra*, p. 44), are attached hereto. The jurisdiction of this Court is invoked under Rule 19 of this Court and 28 U.S.C. 1257(3), which provides for review of final judgments rendered by the highest court of a state by writ of certiorari, "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

QUESTIONS PRESENTED

(1) Whether the owner of property is entitled in an appropriation proceeding instituted by the State of Ohio to admit into evidence expert appraisal testimony that the highest and best use of such property at the time of the taking thereof would be for a purchaser to purchase that property in the expectation of eventual usage for commercial and apartment purposes notwithstanding that the property was zoned for residential usages only at the time the land was actually appropriated by the condemning authority?

(2) Whether the rule of law adopted by the Supreme Court of Ohio in the case of *Masheter* v. *Wood*, (1973) 36 Ohio St. 2d 175, that "in a land appropriation proceeding, opinion testimony of an expert appraisal witness as to the reasonable probability of a zoning change to higher and more valuable use classification is not competent, for the reason that such testimony constitutes speculation as to future administrative or legislative action" when applied to the facts in the instant cause results in the owner being deprived of its property without due process, contrary to the Fourteenth Amendment to the Constitution of the United States?

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the relevant constitutional statutory, and city code provisions involved herein is contained in Appendix E, *infra* pp. 45-54. These relevant provisions are:

> Fourteenth Amendment to the Constitution of the United States; Section 19, Article I, Ohio Constitution; Sections 163.02, 163.03, 163.06, 163.09, 163.14 of the Revised Code of Ohio; Sections 3323.06 and 3331.06 of the Columbus City Code.

STATEMENT OF THE CASE

On May 5, 1969, Respondent, Director of Highways, commenced this action to appropriate 26.49 acres, including 1.56 acres of present road occupied, out of a tract of 30.617 acres of land owned by petitioner, Ohio Holding Company, an Ohio corporation, which real estate is situated on the north side of East Main Street in the City of Columbus, Franklin County, Ohio. At the trial of this action it was stipulated between counsel that the actual

date of taking of this property by the appropriating authority was July 14, 1969.

At the time of the taking the 26.49 acres actually appropriated by the condemning authority was zoned R-1, single family residential, within the meaning of that term as used in Section 3323.06 of the City Code of Columbus. The residue of the original 30.617 acre tract, consisting of 4.127 acres was, at the time of taking, zoned C-4, commercial, within the meaning of that term as used in Section 3331.06 of the City Code of Columbus.

At the trial held in the instant cause there were four expert appraisal witnesses who testified regarding the highest and best use of the subject property being appropriated. Two expert appraisal witnesses testified on behalf of the landowner, and two expert appraisal witnesses testified on behalf of the State. All four expert appraisal witnesses agreed that as of the date of take a prospective purchaser would contemplate that the property would be rezoned for apartment use and commercial use. Their testimony was as follows:

1. *Mr. George Little*, appraisal expert for the landowner:

> ". . . in my opinion, the highest and best use the owner could anticipate would be using this property for the comparable use to other lands in the area . . . Therefore I concluded its highest and best use was for commercial and apartment use."

2. *Mr. Ivan Hill*, appraisal expert for the landowner: "From my investigation, I determined that, with the generosity that the city fathers had in zoning along Main Street, that there was a very great, and a very high probability of changing the zoning on

this residential land to its better use or—determined it had a potential higher use than R-1 zoning on the major portion of the land."

3. *Mr. Donald Kelley*, appraisal expert for the Director of Highways:

"It's my opinion that the highest and best use of this property is a speculative use, is to be purchased by a speculative investor who would be willing to risk his money that the property, some of the property could be rezoned for apartment use and some of the property could be rezoned for commercial use."

4. *Mr. Roy H. Boyd*, appraisal expert for the Director of Highways:

"My opinion would be the highest and best use of that tract would be for its speculative holding pending a possible partial or maybe even larger portion of it to obtain a change in zoning."

Counsel for respondent, Director of Highways, objected to the testimony of the landowner's expert appraisal witnesses as to a potential higher and better use of the property than was permitted under the existing zoning regulations. No objection was made by counsel for the landowner to the testimony of the State's expert appraisal witnesses that a prospective purchaser would buy the property in contemplation of an anticipated rezoning for higher and better uses than permitted under present zoning.

At the close of the evidence the jury rendered a verdict in the amount of $608,000.00 as compensation to the landowner for the 26.49 acres acquired by the Director of Highways, and $50,000.00 as damages to the residue of the original 30.617 acre tract.

This verdict which was journalized by the trial court

on March 7, 1973 and appears as Appendix F (*infra* pp. 55-60) to this petition has been reversed by the Court of Appeals of Franklin County, Ohio, and a new trial has been ordered by that court. The Supreme Court of Ohio has denied a motion to certify the record in this cause and over-ruled the appeal as a matter of right finding no substantial constitutional questions of law.

HOW FEDERAL QUESTIONS PRESENTED

The constitutional questions here involved were first put in issue in the petitioner's notice of appeal and memorandum in support of jurisdiction in the Supreme Court of Ohio in Case No. 73-1027.

REASONS FOR GRANTING THE WRIT

A. *The Principle of Evaluation announced by The Supreme Court of Ohio in the case of Masheter v. Wood (1973) 36 Ohio St. 2d 175 if applied in a retrial of the instant cause would result in the taking of petitioner's property without due process of law.*

The Fourteenth Amendment to the Constitution of the United States protects private property from appropriation by a state without due process of law. See, *Cincinnati v. Louisville & Nashville R. Co.*, 223 U. S. 390, 56 L. Ed. 481, 32 Sup. Ct. 267; *Bank of Toledo v. Toledo*, 1 Ohio St. 622 (1853); 19 O. Jur. (2d) 414, Eminent Domain, Section 7; 2A Nichols on Eminent Domain (3rd Ed., 1970), Section 7.31.

Due process of law includes not only notice and an opportunity to be heard by a competent tribunal in an orderly proceeding. It also requires rules of evidence which are reasonable. The property owner must be afforded an opportunity to present his case. *Crowell v. Benson*, 285 U. S. 22, 76 L. Ed. 598, 52 Sup. Ct. 285.

Clearly, to the extent that a property owner is prevented from establishing the true value of his property by the rules of evidence adopted by state appellate courts, such owner's property is confiscated and taken without due process.

In the case of *Masheter v. Wood* (1973) 36 Ohio St. 2d 175 the Supreme Court of Ohio announced the following principle of law in the syllabus to that case:

> "In a land appropriation proceeding, opinion testimony of an expert appraisal witness as to the reasonable probability of a zoning change to higher and more valuable use classification is not competent, for the reason that such testimony constitutes speculation as to future administrative or legislative action."

In the instant cause the Franklin County Court of Appeals in its opinion rendered September 4, 1973 which appears as Appendix A, at p. 23, to this petition, has expressly approved the use of videotape testimony given by Ivan Hill, one of the expert appraisal witnesses for the landowner at a retrial in this action. During the course of his testimony on behalf of the landowner, Mr. Hill made the following statement in regard to arriving at his valuation of the property being appropriated as of the date of take:

> "Question.
>
> Now what were the basic functions you did in regard to the appraisal of the Ohio Holding Co. property, Mr. Hill?
>
> "Answer.
>
> Well, I'll attempt to name them, I may not be able to name them in the order in which they were performed. The basic functions were that I viewed the property and walked over the property to be appraised, which I should mention is on the north side

of Main Street, approximately 300 feet west of the Northwest corner of Main and McNaughton.

"At that time, or immediately after that, I checked the deed on the property, and when I viewed and walked the property, I of course, checked the contour and shape and size of the property and found that it contained 30 plus acres, or to be exact 30.617 acres. It also contained—or of that amount it contained 1.560 of PRO or an area that the present road occupied. After this, I viewed and checked the area to determine the type and kind of development fronting on Main Street and also the type and kind of development that was adjacent to the frontage properties on Main Street or the development immediately to the rear of the frontage properties. I acquired a set of plans to determine how the property was to be affected by the taking, and discovered from the plans that they were taking all of the PRO plus 24 and 93 hundredths acres of land. I, of course, checked the utilities servicing the property and discovered that they were all city utilities, such as water, sewer, gas and electricity. I checked the zoning on the property and discovered that 4.127 acres of it was zoned C-4, or general commercial, and that 24.930 acres was zoned R-1 or residential, and that the rest of the property or 1.560 was the PRO, as previously mentioned. I then searched the area for comps and comp data. I found no recent sales on Main Street of this large size, nor sales that contained land as diversified in use as subjects property. I then checked the area and zoning maps, as to the many changes on zoning on properties in the area, or on properties close to subject's property. This check was made to determine the probability of a zoning change on subject's land to put it to its highest and best use.

"The zoning in the area is rather confusing, because the City of Whitehall, the City of Reynoldsburg, Franklin County and the City of Columbus all adjoin in the immediate area of subject's location. . . ."

> "So, in analyzing and viewing the area, we find that practically all of Main Street—in fact all of Main Street from Hamilton Road to Big Walnut Creek on the North side is zoned commercial. And the major portion of the usable land on the South side of Main Street is zoned commercial. . . .
>
> "From my investigation, I determined that, with the generosity that the city fathers had in zoning along Main Street, that there was a very great, and a very high probability of changing the zoning on this residential land to its better use or—determined it had a potential higher use than R-1 zoning on the major portion of the land."

This testimony which was expressly approved by the Court of Appeals for use at a retrial in the instant action by reason of decisions dated September 4, 1973 and October 9, 1973 as journalized by that Court on October 29, 1973, would apparently be invalidated by reason of the decision of the Supreme Court of Ohio in the *Wood* case which decision was rendered December 26, 1973.

No appeal was taken by any of the parties in the *Wood* case to this honorable Court, and inasmuch as the *Wood* case principle as enunciated by the Supreme Court of Ohio would affect tremendously the leeway allowed to expert appraisal witnesses in testifying at a retrial of the instant action, the instant action presents an appropriate forum for this Court to test the constitutionality of the rule announced by the Supreme Court of Ohio in the case of *Masheter v. Wood* (1973) 36 Ohio St. 2d 175.

B. *In arriving at the Fair Market Value of property in an Eminent Domain Proceeding, a rule which refuses to allow expert appraisal witnesses to testify to the Reasonable Probability of a zoning change on the property being appropriated, where such probability is a factor that a Willing Purchaser would take into account in arriving at a price to pay for the property being appro-*

priated, deprives the landowner of his property without due process of law.

Real estate valuation calls for particular skills which laymen generally do not possess, and therefore courts frequently have allowed testimony of properly qualified appraisal experts in determining the effect which various zoning situations have on the value of the condemned property. 9 A. L.R. (3rd) 291, 323. Thus, in *People ex rel. Department of Public Works v. Hurd*, 205 Cal App. (2d) 16, 23 Cal. Rptr. 67 (1962), it was held that there was no error in the admission of an expert's testimony as to the special benefits which certain parcels of real estate under condemnation would derive, even though the testimony was based almost entirely upon the reasonable probability of a change of zoning of the parcels.

In *State Roads Commission v. Orleans*, 239 Md. 368, 211 A. (2d) 715 (1965), the Court held that the allowance of testimony by a qualified witness of the probability of a zoning change which would affect the value of the condemned property was proper.

The Supreme Court of Ohio has not been consistent in its formulation of the rule of valuation in land appropriation proceedings, and unless this Court reviews the instant cause, the trial and appellate courts of the State of Ohio will be confused and lack appropriate guidelines for measuring the true value of property taken by an appropriating authority in eminent domain proceedings.

In 1951 the Supreme Court of Ohio established the rule of valuation in land appropriation proceedings for the State of Ohio in the case of *Sowers v. Schaeffer* (1951) 155 Ohio St. 454 wherein that Court stated in paragraph three of the syllabus as follows:

> "The rule of valuation in a land appropriation proceeding is not what the property is worth for any

> particular use but what it is worth generally for any and all uses for which it might be suitable, including the most valuable uses to which it can reasonably and practically be adapted."

In 1953 the Supreme Court of Ohio further explained the rule of valuation as announced in paragraph three of the *Sowers* case in the case of *Langenau Mfg. Co. v. Cleveland* (1953) 159 Ohio St. 525 wherein that Court stated in paragraph three of its syllabus as follows:

> "It is the duty of the court in an appropriation proceeding to afford the property owner the right to fully show the extent and character of the real estate proposed to be taken and its maximum value for any purpose for which its use is available, including the use which is presently made of it.

The rule of valuation as stated in the *Sowers* case was specifically approved in the opinion written for that Court by Justice Hart. (See, 159 Ohio St. 525, 531).

In 1955, the Supreme Court of Ohio made the following statement in the first paragraph of its syllabus in the case of *Ohio Turnpike Comm. v. Ellis* (1955) 164 Ohio St. 377:

> "On appeal from the final judgment in a proceeding to appropriate private property for public use, the controlling question for determination is whether the landowner, in a fair trial received just compensation for his property actually taken and whether the damages to his remaining adjacent land were fairly assessed."

In his opinion written for the majority of the Court Justice Zimmerman again specifically approved of the rule of valuation as set forth by the Supreme Court of Ohio in the *Sowers* case. (See, 164 Ohio St. 377, 381).

In 1958, paragraph three of the syllabus in the *Sowers*

case was again quoted with approval by Chief Justice Weygandt at page 468 in his opinion written for the Supreme Court of Ohio in the case of *Thormeyer v. Joseph Evans Ice Cream Co.* (1958) 167 Ohio St. 463.

In 1959 the Supreme Court of Ohio again reaffirmed the principle of valuation in a land appropriation proceeding enunciated in paragraph three of that Court's syllabus in the *Sowers* case in the the case of *Board of County Commrs. v. Thormeyer* (1959) 169 Ohio St. 291 wherein the Court stated in the first paragraph of its syllabus as follows:

> "In determining the value of land in an appropriation proceeding, the question to be determined is the worth of the property for any and all uses for which it may be suitable, including the most valuable uses to which the land can *lawfully*, reasonably and practically be adapted." (Emphasis added.)

As can readily be ascertained, the only difference between paragraph three of the syllabus in the *Sowers* case handed down by the Supreme Court of Ohio in 1951 and paragraph one of the syllabus in the *Thormeyer* case handed down by that Court in 1959 is the addition of the word "lawfully" to the syllabus as it was phrased in the *Thormeyer* case.

In 1971 the Franklin County Court of Appeals handed down its decision in the case of *Masheter v. Mariemont* (1971) 36 Ohio App. 2d 78 wherein that Court made the following observation at page 81 of its opinion:

> "Highest and best use as a value factor in the determinations of appraisers is subject to definite limitations imposed by law. A rather early case, although there were others earlier, provides a basic rule. In *In re Appropriation by Supt. of Public Works v. Schaeffer* (1951), 155 Ohio St. 454, the court announced the basic rule, as follows:

> '3. The rule of valuation in a land proceeding is not what the property is worth for any particular use but what it is worth generally for any and all uses for which it might be suitable, including the most valuable uses to which it can reasonably and practically be adapted.'

"A subsequent case, *In re Appropriation of Easement for Highway Purposes: Bd. of County Commrs. v. Thormeyer, Acting Dir. of Highways* (1959), 169 Ohio St. 291, is important because of an addition to the language in the syllabus rule. In *Schaeffer* the phrase was, 'the most valuable uses to which it *can reasonably and practically* be adapted.' (Emphasis added.) In *Board of County Commrs.*, the wording is as follows:

> '1. * * * the most valuable uses to which the land *can lawfully*, reasonably and practically be adapted.' (Emphasis added.)

"The additional term 'lawfully' is the basis for the statements of textwriters and courts that the highest and best use is *ordinarily* one which is permitted by zoning regulations. . ." (Emphasis added.)

Thus, the Court of Appeals of Franklin County placed a great deal of emphasis on the fact that the Supreme Court of Ohio included the word "lawfully" in the first paragraph of its syllabus in the *Thormeyer* case, which word did not appear in the third paragraph of that Court's syllabus in the *Sowers* case. The Franklin County Court of Appeals indicated that this was a significant change in the principle of law as to valuation in appropriation proceedings in cases tried in the State of Ohio.

The Supreme Court of Ohio denied a motion to certify the record in the *Mariemont* case on September 15, 1971 (Case No. 71-308), the effect of which ruling by that Court was neither approval nor disapproval of the holding of the Franklin County Court of Appeals in the

Mariemont case. *Swetland Co. v. Evatt, Tax Commr. et al., Park Investment Co. v. Tax Commr. et al.* (1941) 139 Ohio St. 6; *Keesecker v. G. M. McKelvey Co.* (1943) 141 Ohio St. 162.

However, on December 26, 1973, the Supreme Court of Ohio announced its decision in the case of *Masheter v. Wood* (1973) 36 Ohio St. 2d 175 wherein that Court stated in its syllabus as follows:

> "In a land appropriation proceeding, opinion testimony of an expert appraisal witness as to the reasonable probability of a zoning change to higher and more valuable use classification is not competent, for the reason that such testimony constitutes speculation as to future administrative or legislative action."

Furthermore, at page 177 in the majority opinion of that Court the following statement appears:

> "The rule of valuation in land appropriation proceedings in Ohio is not based upon 'what the property is worth for any particular use but what it is worth generally for any and all uses for which it might be suitable, including the most valuable uses to which it can reasonably and practically be adapted.' Paragraph three of the syllabus in *Sowers v. Schaeffer* (1951), 155 Ohio St. 454.
>
> "This rule was subsequently enlarged in paragraph one of the syllabus in *Board of County Commrs. v. Thormeyer* (1959), 169 Ohio St. 291, to include 'the most valuable uses to which the land can *lawfully*, reasonably and practically be adapted.' (Emphasis added.)
>
> "This addition to the rule would seem to exclude uses, which are prohibited by zoning regulations, from consideration in determining the highest and best use to which land may be adapted."

Therefore, at first glance it appears that the Supreme Court of Ohio has considered the addition of the word

"lawfully" in the first paragraph of the *Thormeyer* case syllabus as constituting a different rule of valuation in land appropriation proceedings from the rule established in the third paragraph of the *Sowers* decision. However, a later decision of the Supreme Court of Ohio indicates that the rule of valuation in land appropriation proceedings remains the rule of valuation as stated in the third paragraph of the *Sowers* case, and that the addition of the term "lawfully" in the first paragraph of that Court's syllabus in the *Thormeyer* case did not change that rule. That this is so is clearly established by the decision handed down in 1969 in the case of *In Re Appropriation For Hwy. Purposes* (1969) 20 Ohio St. 2d 43 wherein the Supreme Court of Ohio held, in a *per curiam* opinion, as follows:

> "*Per Curiam.* Appellants [landowners] were entitled to have the trial court instruct the jury in accordance with the principle enunciated in paragraph three of the syllabus of *Sowers v. Schaeffer* (1951), 155 Ohio St. 454, which provides:
>
> > 'The rule of valuation in a land appropriation proceeding is not what the property is worth generally for any particular use but what it is worth generally for any and all uses for which it might be suitable, including the most valuable uses to which it can reasonably and practically be adapted.'
>
> "Inasmuch as it is clear from the record in this case that the trial court refused to so instruct the jury over objection by counsel for appellants, we determine that there is error prejudicial to appellants and that the judgment of the Court of Appeals should be reversed. See, also, *Cincinnati & Springfield Ry. Co. v. Longworth* (1876), 30 Ohio St. 108; *Bd. of County Commrs. v. Thormeyer* (1959), 169 Ohio St. 291." (Language in brackets added.)

The observation during the course of the majority opinion of the Supreme Court of Ohio in the *Wood* case that the addition of the word "lawfully" in the first paragraph of the syllabus in the *Thormeyer* decision handed down in 1959 apparently changed the rule of valuation established in the third paragraph of the syllabus in the *Sowers* decision handed down in 1951, ignores the fact that that Court recognized the *Sowers'* rule as a complete and correct statement of the rule of valuation in appropriation cases in the case of *In Re Appropriation* announced in 1969.

The Ohio Supreme Court has held on numerous occasions that the law as stated in the syllabus of the decision announced by that Court must be interpreted in light of the facts of the case. *Witte v. Lockwood* (1883) 39 Ohio St. 141; *Baltimore & Ohio Rd. Co. v. Baille* (1925) 112 Ohio St. 567; *Williamson Heater Co. v. Radich* (1934) 128 Ohio St. 124. Furthermore, that Court has recognized that *obiter dicta* does sometimes appear in the syllabus of a case. *Thackery v. Helfrich* (1931) 123 Ohio St. 334.

The third paragraph of the syllabus in the *Thormeyer* case states as follows:

> "Compensation for land taken, pursuant to an exercise of the power of eminent domain, and for damages to the residue thereof not taken can properly be based on evidence as to its value for commercial uses, notwithstanding that such land was held under a deed containing restrictions against using the land except for a children's home and against selling it."

The *Thormeyer* case involved an appropriation by the Director of Highways of land owned by the Board of County Commissioners of Jefferson County, which land was held pursuant to a deed of trust which restricted the

use of that land to the maintenance of a children's home. The issue before the Ohio Supreme Court in that case was whether the deed restrictions had to be given effect in a determination of the fair market value of the real property being appropriated.

During the course of his opinion for the Court Justice Taft outlined three different conclusions as to the consideration which might be given to the deed restrictions. Those conclusions were as follows:

1. No consideration should be given to the deed restrictions.
2. Full consideration should be given to the deed restrictions.
3. Consideration should be given to the deed restrictions, but consideration might also be given to what chance there might be of having the deed restrictions removed by legislative or other action.

Justice Taft went on to note that if no consideration were given to the deed restrictions that would result in a windfall to the landowner; but to enforce the deed restrictions would result in a windfall to the appropriating authority.

Justice Taft then reviewed the problems presented by a choice of *any* of the different conclusions in the following paragraph of the opinion:

> "Valid arguments may be advanced against each of the foregoing three conclusions with respect to this question or solutions thereof which have been recognized by the courts. Under the first giving no consideration to restrictions on the use of the property, the owner in effect gets more than the property was worth to him and thus may be said to get a windfall because of the appropriation, although the appropria-

tor pays no more for the property than it is worth. Under the second, giving full consideration to such restrictions, the appropriator of the property is enabled to acquire it for less than it is worth, and thus may be said to get a windfall, although the owner at least theoretically is supposed to receive what the property was worth to him. The third solution, which gives effect to the restrictions but allows consideration of the chance of their removal, still involves at least part of the windfall to the appropriator involved in the second solution although it eliminates the windfall to the owner involved in the first solution and tends to avoid the possibility, involved in the second solution, that the owner may not get what the property was really worth to him. However, the third solution has a very serious disadvantage in that it greatly complicates the problem of determining the amount of the award by introducing an additional question to be considered by the jury in making that determination, *i.e.*, the question as to the change of a legislative or some other elimination of the restrictions involved. How can a jury make any intelligent evaluation of such a factor The answer is obvious. It cannot. In our opinion, the uncertainty and confusion that would be created by requiring a jury, in determining the amount of its award, to evaluate such a nebulous factor would outweigh any theoretical advantage that the third solution might provide. Hence, we believe that our choice should be made between the first and the second solution, although we recognize that the choice will necessarily involve a choice of one of two apparently undesirable results, (1) a windfall to the owner or (2) a corresponding windfall to the appropriator." (159 N.E. 2d 612, 617)

The ultimate result arrived at by the Court was to entirely disregard the deed restrictions in arriving at a fair market valuation of the property, thereby granting

a windfall to the owner. The basis for the Court's justification of that choice was that the owner has no control over the appropriation of his property, and therefore the windfall should be resolved in his favor rather than in favor of the State.

It is important to note that the *Thormeyer* case is persuasive authority in support of the position that zoning restrictions should not be considered in determining the value of land in an appropriation proceeding occurring in the State of Ohio since deed restrictions are not to be considered in determining that value. It would have been unlawful for the Board of County Commissioners in the *Thormeyer* case to use the property being appropriated for any use other than a children's home, and a civil action could have prevented them from making any other use of the property. Likewise, zoning restrictions allow a civil action to be brought to prevent a use of the property not authorized by the zoning restrictions. Thus, deed restrictions and zoning restrictions have the same effect.

For the Supreme Court of Ohio to be consistent with its holding in the *Thormeyer* case, it should have ruled in the *Wood* case that zoning restrictions are not to be considered in arriving at the fair market value of property being appropriated in an eminent domain proceeding. However, as has previously been indicated in this petition, the Ohio Supreme Court ruled in an exactly contrary fashion in the *Wood* case without attempting to distinguish the *Thormeyer* decision.

This Honorable Court should exercise jurisdiction in this cause to clarify and define the extent to which the due process clause of the Fifth Amendment to the United States Constitution as applied to the States by reason of

the Fourteenth Amendment allows an expert appraisal witness to either ignore present zoning or alternatively to consider the probability of a change in zoning of land being appropriated by a condemning authority in eminent domain proceedings in arriving at his opinion of fair market value as of the date of take.

C. *Where it is shown that other similar property in the area has been recently rezoned or that development and use patterns have been such that a reclassification would fit such zoning pattern or use, an expert appraisal witness should be allowed to testify that the highest and best use of the property would be for purchase by an investor to hold the property in anticipation of a change of zoning classification to a higher and better use.*

If it can be shown that other similar property in the area was recently rezoned, or that the development in use patterns has been such that a denial of reclassification would probably be upset by the courts, the condemnee has a good chance of getting the valuation made on the basis of the probability of such a change. 9 A.L.R. (3d) 291, 298.

Although the probability of rezoning may be not be founded upon a mere need for a change in zoning standards, a general change in the character of the use of property in the neighborhood has been held to show a reasonable probability of a change in zoning. Thus, evidence that a tract zoned for single-family residences was near the highway, was directly across from commercially developed property, and was some distance from schools, churches and a shopping area was held in *Park District of Highland Park v. Becker,* 60 Ill., App. (2d) 463, 208 N.E. (2d) 621 (1965), to warrant consideration of the probability of rezoning in the near future to commercial

use in determining the value of the property taken in eminent domain. See, 4 Nichols on Eminent Domain (3d Ed., 1962), § 12.322 [1]. and the numerous cases cited therein.

The proclivity of a zoning board toward change, as manifested by its favorable action on petitions for rezoning of other parcels, has been considered an influential factor tending to establish the reasonable probability of rezoning the condemned property. Thus, the Court in *0.040 Acres of Land v. State* (1964, Del. Sup.), 198 A. (2d) 7, held that there was a reasonable probability of rezoning where, along with other factors, the history of zoning in the area indicated a general trend from residential to commercial. See, 9 A.L.R. (3d) 291, 317, and the numerous cases cited therein.

The evidence in the case at bar presented on behalf of the landowner clearly indicates that a willing purchaser in a free and open market would have contemplated the probability of a zoning change on the subject property to a higher and better use classification, at least as to that portion of the premises which fronted on East Main Street in the City of Columbus, Ohio. Accordingly, a rule of law such as that announced by the Supreme Court of Ohio in the *Wood* case, which deprives the landowner of the right to have an expert appraisal witness testify that this was a factor he took into account in arriving at his opinion of the fair market value of the land being appropriated is to eliminate a factor that a willing purchaser would consider in arriving at fair market value, and can operate to the detriment of the landowner and to the benefit of the appropriating authority, thereby allowing the appropriating authority to obtain property at less value than that property would have sold for on

the open market at the date of take. To the extent that there is a *pro tanto* diminution of the value which the appropriating authority takes the property at as assessed by a jury, there has been a taking of property by the appropriating authority without due process of law.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX A

In the Court of Appeals of Franklin County, Ohio

P. E. MASHETER, DIRECTOR OF HIGHWAYS,
STATE OF OHIO,
Plaintiff-Appellant,

v.

OHIO HOLDING COMPANY,
HOLDING CORPORATION OF OHIO,
AUDITOR OF FRANKLIN COUNTY, OHIO,
and
TREASURER OF FRANKLIN COUNTY, OHIO,
Defendants-Appellees.

No. 73AP-88

DECISION

Rendered on September 4, 1973

MR. WILLIAM J. BROWN, Attorney General,
MR. DONALD J. GUITTAR and
MR. RALPH C. GODWIN, Assistants,
Statehouse Annex,
Columbus, Ohio
For Plaintiff-Appellant.

LUCAS, PRENDERGAST, ALBRIGHT,
GIBSON, BROWN & NEWMAN,
MR. ROBERT E. ALBRIGHT and
MR. TIMOTHY J. UCKER, of Counsel,
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For Appellee Ohio Holding Company.

MR. GEORGE C. SMITH, Prosecuting Attorney,
Franklin County Courthouse,
Columbus, Ohio,
For Appellees Auditor and Treasurer
of Franklin County, Ohio.

WHITESIDE, J.

This is an appeal from a judgment of the Franklin County Court of Common Pleas.

This is an eminent domain proceedings brought by the Director of Highways pursuant to R. C. Chapter 163, to appropriate property of defendants needed in the construction and improvement of Route No. I-270 in Franklin County, Ohio. The case proceeded to a jury trial for the ascertainment of the compensation due defendants for the taking of this property. The jury returned a verdict assessing compensation for the land taken in the amount of $608,000 and an additional amount of $50,000 for damages to the residue. The director appeals and raises four assignments of error as follows:

"1. The court erred in its rulings on an objection to and a motion to strike immaterial and prejudicial allegations in owners' opening statement, and objections to and a motion to strike testimony in substantiation of those allegations during the trial.

"2. The court erred in overruling the director's objections to the admission into evidence of the selling price of lands zoned for a higher classification than the property taken, and in refusing to strike the entire testimony of Mr. Hill.

"3. The court erred in its refusal to strike the testimony of the witness, George Little.

"4. The court erred in its refusal to instruct the jury on the law as follows:

" 'The determination of compensation cannot be dependent upon whether or not there will be a change of zoning of the property in the future. Compensation must be based upon the fair market value of the property for its highest and best use available within existing zoning regulations. The possibility of future rezoning may not be utilized to increase the fair market

value over that which an informed willing purchaser would pay under existing zoning. If, however, such a purchaser would be presently willing to pay more than an amount justified by the uses permitted under existing zoning because of a general belief that there is a probability of a change of zoning, to permit a more valuable use within the reasonably foreseeable future, such evidence is admissible because it does reflect a factor in the present fair market value under existing zoning.' "

The first assignment of error relates primarily to a statement by counsel for defendants in opening statement, concerning a subdivision plat submitted by defendants to the city of Columbus which allegedly was rejected upon the grounds that the area was to be taken for highway purposes, which occurred several years before the date of taking. References were also made to litigation concerning the subdivision plat.

The trial court permitted counsel for defendants to continue with the opening statement over the objection of the assistant attorney general. However, the trial court did remind the jury that the opening statement was not evidence and that the matter might or might not be admissible evidence at trial, ending with the statement that "I'm going to let him complete his statement with the understanding that, you understand, it's not evidence. It may well be that as I understand the issue in the case, it may be admissible. If I feel it isn't admissible, I'll so rule."

During the trial, the trial court excluded the evidence pertaining to the subdivision plat, stating to the jury (Tr-106):

"The Court: Ladies and gentlemen, I have decided that the objection should be sustained

> and that the plat would really have nothing to do with the merits of this case so I sustained the objection."

While the trial court should have excluded the references to the subdivision plat during opening statement, the trial court did exclude the evidence when offered and gave cautionary instructions to the jury both at the time of opening statement and at the time of exclusion of the evidence. For this reason, we find no prejudicial error in the trial court's overruling the objection to the opening statement. The first assignment of error is not well taken.

The second and third assignments of error are related and will be considered together, although they refer to the testimony of two different expert witnesses offered by defendants.

This case involves a complex and difficult valuation issue in that the property taken was zoned for single-family residential use but all of the expert witnesses, both those for the property owner and those for the director, testified that the highest and best use of the property would be to hold the property for future development under an anticipated change of zoning for commercial and apartment use. The residue of the tract had been rezoned to commercial use approximately a year before the date of take, and at the same time another portion of the original residue was zoned for apartment use, which portion was sold by the property owner prior to the date of take.

The record is replete with references to zoning requests and denials both as to subject property and other properties in the area, coupled with the property owner's contention that rezoning of the subject property taken had been denied solely because it was anticipated that it would be taken for highway purposes. Likewise, there

are throughout the record contentions by the director that it was the policy of the city of Columbus to have no commercial zoning in this area, coupled with the contention that the rezoning of the residue which occurred was a result of the taking, although it occurred a year prior thereto. This inconsistency in the contentions of the parties created a difficulty for the trial court upon which he commented at length.

Compensation for land taken for public use is determined by the fair market value of the property on the date of taking unless for some unusual circumstance a different earlier date of valuation is ascertained. In this case, it was agreed that the date of take, and the date of valuation, was July 14, 1969.

Fair market value is the amount of money which could be obtained on the open market at a voluntary sale of the property. It is the amount that a purchaser who is willing, but not required to buy, would pay and that a seller who is willing, but not required to sell, would accept, when both are fully aware and informed of all circumstances involving the value and use of the property. Market value is determined by the most valuable and best uses to which the property could reasonably, practically, and lawfully be adapted which is referred to as "the highest and best use."

The zoning of property is an important factor in determining highest and best use because an informed buyer would not pay more for property than it is worth for a use to which it can lawfully be put. Accordingly, evidence of value of property for a use which is not permitted by the zoning of the property is inadmissible in an eminent domain proceedings. However, it is generally recognized that zoning laws are changed from time to time and that, especially with respect to undeveloped

property, development of an area may result in a change of zoning from residential to apartments or to commercial. Both the evidence in this case, and general knowledge, indicate that developers or investors buying such tracts of property anticipate a change of zoning and pay more for the property than it would be worth if devoted to the uses permitted by the existing zoning.

Holding property for future development in anticipation of a change of zoning to permit a more valuable use of the property to which it could reasonably and practically be adapted, if permitted by the zoning, is obviously a permitted use under existing zoning. How much an informed buyer would pay for property for that purpose is an issue of fact, and evidence may be admitted in an appropriation proceedings upon the issue. Obviously, the amount an informed buyer would pay under such circumstances depends upon his impression of the degree of probability of anticipated change of zoning and the length of time that he anticipates that the property must be held before such change in zoning occurs.

However, whether or not the zoning authorities will in fact change the zoning is not an issue in appropriation proceedings. Nor is the issue of validity of the existing zoning, which, if an issue, must be determined by separate proceedings.

The zoning problem has been the subject of decisions in three other appellate districts: *Euclid v. Lakeshore* (1956), 102 Ohio App. 96; *In re Appropriation of Easement* (1963), 118 Ohio App. 315; and *Board of Education v. Graham* (1968), 15 Ohio App. 2d 196. *Graham* followed *Euclid* and *In re Appropriation* distinguished it. In *Euclid*, it is stated, at page 111:

> "* * * To speculate on what may be the legislative policy of a council of a city or village in the future

in changing a particular zoning classification when considered for the purpose of fixing the value of land taken for public purposes is of such a speculative character that a court should not permit such evidence of value of the property to be presented in the trial of a condemnation proceeding. * * *"

In *In re Appropriation*, it is stated at page 320:

"Properly admitted uncontroverted evidence in this record demonstrates that a reconsideration and amendment of the zoning applicable to this parcel was certain under conditions existing on the date of taking."

The zoning issue was also discussed in the unreported decision of this court in *Masheter v. Mariemont*, rendered January 12, 1971, in case No. 9933. In that decision, Judge Troop stated:

"* * * the highest and best use is ordinarily one which is permitted by zoning regulations. * * * But buyers do buy and pay more for a given parcel of land than can be supported by a present legally permitted use, a possible highest and best use not in conformity to existing zoning limitations. Courts appear to permit such a situation to be considered and relax the rigid rule limiting testimony to the highest and best use permitted by present zoning regulations, but only within definite limitations."

Judge Troop further stated the rule to be applied, as follows:

"The determination of compensation cannot be dependent upon whether or not there will be a change of zoning of the property in the future. Compensation must be based upon the fair market value of the property for its highest and best use available within existing zoning regulations. The *possibility* of future rezoning may not be utilized to increase the fair market value over that which an informed willing

purchaser would pay under existing zoning. If, however, such a purchaser would be presently willing to pay more than an amount justified by the uses permitted under existing zoning because of a general belief that there is a *probability* of a change in zoning, to permit a more valuable use within the reasonably forseeable future, such evidence is admissible because it does reflect a factor in the present fair market value under existing zoning."

The court assumed that the rule so stated was sufficiently clear; however, the comments of counsel for both parties and the trial court indicate that this court was incorrect in this assumption.

We would thus attempt to clarify the issue and restate it as follows:

(1) Fair market value is not dependent upon whether there will, or will not, in fact be a change of zoning of the property in the future. Fair market value must be determined upon the basis of the highest and best use available within existing zoning. There should be no speculation as to what the future policy of the zoning authorities will be in regard to zoning of the property, except to the extent, if any, it is shown by expert-appraiser testimony that informed sellers and purchasers would so speculate.

(2) The mere possibility of future rezoning may not be utilized to increase fair market value to an amount over and above that which an informed willing purchaser would presently pay under existing zoning.

(3) It may, however, be shown by expert-appraiser testimony that the highest and best use available, within existing zoning regulations, is to hold certain property for future development upon a generally held belief by informed purchasers and sellers that there is a proba-

bility of rezoning to permit a more valuable use within the reasonably foreseeable future.

(4) Further, where it is shown by such expert testimony that the highest and best use of property is to hold it for future development in anticipation of a future rezoning, the fair market value of the property is the amount that an informed willing purchaser would be presently willing to pay for the property, and an informed owner willing to accept, with full knowledge of the existing zoning, the probability of future rezoning, the difficulties attendant in obtaining same, and the reasonably foreseeable period of time necessary to hold the property before such change of zoning could be obtained, the adaptability of the property to the more valuable use, and the general development in the area involved, and evidence thereon may be presented by expert-appraiser testimony.

Thus, as stated by Judge Troop in *Mariemont, supra*:

> "Many factors enter into the consideration of buyers with respect to a given piece of land. Site analysis may be limited to present usage. It must be recognized, however, that a buyer may have in mind holding land out of use to await appreciation in value. The question is, narrowly and strictly, just what price would a willing purchaser pay an equally willing seller for the premises taken on a particular day * * *?"

Thus, the issue remains, what is the fair market value of the property under existing zoning? This is the highest price that an informed willing buyer would pay and the lowest price that an informed willing seller would accept. It remains the price that the property would bring at a voluntary sale on the open market. But that price must be one uninfluenced by the existence of the improvement

for which the property is being taken. In other words, in this case, the fair market value of the property taken is the amount that the property would bring in a voluntary sale on the open market on the date of take, July 14, 1969, assuming the property was not to be taken for highway purposes.

That the instant case is one where an informed willing buyer would anticipate a future change of zoning to a more valuable use is indicated by the testimony of all of the expert witnesses. The property contains some 1700 feet of frontage on East Main Street with varying depths.

Property owner's witness Hill testified that the highest and best use of the portion of the property zoned for commercial was commercial. He further testified that of the portion of the property zoned for residential usage, the highest and best use of the frontage to a depth of approximately 300 feet was for potential commercial usage and that the highest and best use of the remainder was for potential apartment usage.

Property owner's witness Little ignored the existing zoning in determining highest and best use and testified that the highest and best use of the frontage (including the residue zoned for commercial) was for commercial usage and that the highest and best use of the remainder was for apartment use and so appraised and valued the property.

Director's witness Kelly testified that the highest and best use "is a speculative use, is to be purchased by a speculative investor who would be willing to risk his money that the property, some of the property could be rezoned for apartment use and some of the property could be rezoned for commercial use." Witness Kelly ignored the commercial zoning of the residue tract, contending that "These zonings had absolutely nothing to do with the

property prior to the taking even though these zonings occurred about a year before the taking." We, parenthetically, note that this statement is in error and that existing zoning on the date of take must be considered in determining value of the property regardless of the motivation or reason for the rezoning unless a different date of valuation is established.

The director's witness Boyd testified that the highest and best use of the property "would be for a speculative holding pending a possible partial or even larger portion of it to obtain a change in zoning."

Turning now to the second assignment of error which is directed to the testimony of witness Hill, the first objection is to the admission into evidence of the selling price of comparable property zoned for commercial usage. This evidence of comparables was first introduced with respect to the value of the residue before the taking, which residue was zoned for commercial. The evidence was admissible for that purpose. The before value of the residue properly would be predicated upon its existing commercial zoning.

Witness Hill also testified that he utilized the same comparable sales together with another comparable sale of property zoned residential, but also with a highest and best use of potential commercial, in formulating his opinion as to the fair market value of the portion of the property taken which he considered to have a highest and best use of potential commercial pending possible rezoning. While the testimony of Mr. Hill, as that of the other experts, is not as complete as might be contemplated by the foregoing discussion, in view of the fact all the experts agreed that this was a situation where an informed purchaser would purchase the property in

anticipation of a future zoning change, we find no prejudicial error.

It is not unreasonable that a prospective buyer or seller would consider the value that property would have if rezoned, in determining to purchase property in hopes of obtaining a rezoning to that usage. He might also consider the value of the property for uses permitted by existing zoning, and then be willing to pay some amount between the two depending upon the degree of risk he believes involved. An expert witness may express his opinion as to the degree of risk involved and, obviously, in this case the experts differed in this regard.

Furthermore, witness Hill testified that he made adjustments in arriving at his opinion, predicated upon the fact that the property was presently zoned residential. This is borne out by the fact that he testified that the value of the residue presently zoned for commercial was $40,000 per acre, whereas he testified that the value of the portion of the taking which he considered to have the highest and best use of potential commercial to be $32,000 an acre.

Witness Hill also testified as to comparable sales of property zoned for apartment use with respect to that portion of the taking which he considered to have a highest and best use for potential apartment use. Included in these sales was the sale of the original portion of the tract involved which was rezoned for apartment use and which was sold for $17,000 an acre. Witness Hill again testified that he made adjustments because of the present zoning of the property taken and found a present value of that portion of $12,000 an acre. Again, we find no prejudicial error.

Witness Hill did tend to divide the property taken into two separate tracts for valuation purposes dependent

upon what he considered to be the potential usage of the property; however, no objection was directly directed thereto with a contention that the property taken should be valued as a unit rather than two separate units.

It might be noted that witness Hill testified by means of videotape deposition. Such deposition was not transcribed by the court reporter and this court reviewed the testimony on videotape. Except for the additional time involved in reviewing the videotape deposition, it appears to be a satisfactory method of review and has afforded the court a clear understanding of the testimony of the witness.

We conclude that the director has not demonstrated prejudicial error by the trial court in admitting the testimony of witness Hill or in refusing to strike his testimony. Accordingly, the second assignment of error is not well taken.

The third assignment of error relates to the refusal of the trial court to strike the testimony of witness Little. Witness Little, in his testimony, ignored the present zoning and valued the property as if it were zoned for commercial use along the front and apartment use to the rear. This is indicated by his testimony on cross-examination, as follows (Tr-61):

"Q. * * * Will you tell me that again, what your opinion of the highest and best use of it was on July 14?

"A. My opinion of the highest and best use, the highest and best use of the property as of the date of taking was for, to be used for Commercial along the front and the multi-family Residential in the rear.

"Q. And that's your opinion of the highest and best use?

"A. Yes.

"Q. It was Commercial along the front?

"A. Sure.
"Q. Regardless of the fact that it was zoned Single Family Residential and could not be used for that purpose
"A. That's right, sir.
"Mr. Godwin: I move the entire testimony of this witness be stricken.
"The Court: All right. Overruled."

That the witness Little ignored present zoning is also indicated by the fact that he valued both the residue which was zoned commercial and that portion of the taking, which he testified had a highest and best use for commercial, at the same value of $43,000 per acre.

Since the testimony of witness Little was predicated upon the value of the property for uses not permitted under present zoning, the trial court erred in not striking that testimony.

While an expert witness may testify as to a price an informed willing buyer will pay, and an informed willing seller will accept, in anticipation of the future rezoning of the property to a more valuable use than permitted by present zoning, he may not testify, and predicate his opinion of value, upon the value that the property would have if it were rezoned to such more valuable use. The testimony must relate to the present fair market value of the property under the existing zoning, taking into consideration the extent, if any, that an informed purchaser would presently pay a higher value than justified by the uses permitted by present zoning, in anticipation of future rezoning to a more valuable use.

The fourth assignment relates to the trial court's refusal to instruct the jury upon the zoning issue. This was requested by the director, both prior to and subsequent to the charge by the court. While the requested charge itself may have been inappropriate, because it related to

the admissibility of evidence rather than the function of the jury, the trial court should have charged upon the issue when requested.

This is especially true in light of the charge by the trial court to the jury that, "In determining the fair market value, you may consider what the property was worth generally for any and all uses for which it might be suitable including the most valuable and best uses which it could reasonably and practically be adapted." (Tr-69.) And the further statement in the charge that, "In this case, you have become acquainted with the nature, the present and possibly future uses and you have heard the opinions as to its values. You must consider these factors along with all the evidence ** *."

Despite the repeated references to zoning during the testimony, and improper evidence presented with respect thereto by both parties, the trial court at no time, although requested, gave any instruction to the jury as to the effect of zoning or of what consideration should be given to it by the jury. The charge, as given, is open to the interpretation that the jury should give no consideration whatsoever to the existing zoning in determining compensation.

For the foregoing reasons, the first and second assignments of error are overruled, and the third and fourth assignments of error are sustained; and the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with this decision.

Judgment reversed and remanded.

TROOP, P. J., concurs.

HOLMES, J., concurs in part and dissents in part. I concur with the majority herein as such decision

relates to assignments of error numbers one, three, and four, and would remand therefor. However, I differ from my colleagues as such decision relates to assignment of error number two.

The testimony of Mr. Hill on videotape, although very professionally rendered, was prejudicial error in the manner in which presented. Properly framed, and within the proper context, such testimony regarding fair market values could well have been appropriate, but not as such testimony stood.

For the purposes of presentation of testimony by an expert witness, where the sale prices of other properties are not of properties similarly zoned, considerable care need be exercised in the presentation of the data by the expert.

What in fact that is being presented are not comparables in the sense of present lawful use, but potential comparables in the event such properties would be rezoned, and such data must be presented in such a fashion that it is clear to the jury that the attendant adjustment factors as applied by the expert are for the reason of the more restrictive present use.

I agree with the general statement of the rule to be applied in determining "fair market value" where dealing with property of more limited zoning use as contained in subsections (1), (2), (3) and (4) as set forth in the majority opinion herein.

I believe that testimony as to what an informed willing purchaser would presently be willing to pay for property when there is a general belief that there is a probability of a change of zoning to permit a more valuable use within the reasonably foreseeable future would be admissible, *but* only within a proper framework of the presentation of such testimony.

First it must be shown that such purchaser is an informed purchaser with knowledge of the present zoning, purchasing from an informed seller; the probability of the future zoning; the difficulties attendant in obtaining such change of zoning; the reasonable foreseeable period of time necessary to hold the property before such change of zoning could be obtained; the adaptability of the property to the more valuable use, and the general development the area involved.

In the matter before this court, Mr. Hill's testimony was lacking in many of the prerequisites to the admission of the testimony relative to the other sales transactions of properties zoned differently than that with which they were being compared.

It is true that Mr. Hill, in arriving at his figures relating to the fair market values of the parcels, made some rather significant adjustments thereto, but such adjustments did not completely cure what I believe to be prejudicial error in the manner in which his testimony relating to these noncomparable sales was given.

It is my view that the jury in this regard could not have failed to be confused, particularly in light of the fact that the court did not charge in clarification of such issue.

APPENDIX B
IN THE COURT OF APPEALS OF FRANKIN COUNTY, OHIO

P. E. MASHETER, DIRECTOR OF HIGHWAYS, STATE OF OHIO,

Plaintiff-Appellant,

v.

OHIO HOLDING COMPANY, HOLDING CORPORATION OF OHIO, AUDITOR OF FRANKLIN COUNTY, OHIO, and TREASURER OF FRANKLIN COUNTY, OHIO,

Defendants-Appellees.

No. 73AP-88

DECISION

Rendered October 9, 1973

MR. WILLIAM J. BROWN, Attorney General,
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MR. GEORGE C. SMITH, Prosecuting Attorney,
Franklin County Hall of Justice,
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For Appellees Auditor and Treasurer of Franklin County, Ohio.

WHITESIDE, J.

Defendant has filed a motion for reconsideration and clarification of the decision of this court rendered herein on September 4, 1973.

Defendant first contends that this court should reconsider its decision with respect to the third assignment of error raised by plaintiff. Defendant contends that other evidence than that quoted by this court in its decision indicated that witness Little applied the proper standard in testifying as to his opinion as to the value of the property involved. While the additional testimony referred to by defendant does go into greater detail, it likewise clearly indicates that witness Little disregarded the existing zoning in arriving at his opinion as to the value of the property. The essential testimony by Mr. Little was as follows (TR-35):

> "* * *
> "Therefore in my opinion, the highest and best use the owner could anticipate would be using this property for the comparable use to other lands in the area. That would be either that, or he's discriminated against. * * * Therefore I concluded its highest and best use was for Commercial and apartment use. * * *"

Mr. Little's testimony did not conform to the standards required as set forth at pages 11 and 12 of our original decision herein.

Defendant further contends that this court should reconsider and clarify its decision with respect to the fourth assignment of error. That assignment of error was phrased with respect to an instruction requested by plaintiff and quoted that instruction. However, Civ. R. 51 (A) no longer requires that the court give a requested instruction in the exact language requested. Civ. R. 51

(A) further provides that:

> "No party may assign as error the giving or the failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. * * *"

Counsel for plaintiff did avail himself of the opportunity to object to the charge prior to the jury retiring stating the objection in the following language (TR-379):

> "I just want to let the record show that the Court has not instructed the jury that compensation must be based upon the fair market value of the property for its highest and best use available within existing zoning regulations."

The fourth assignment of error was considered by this court in light of this objection and of the arguments made by counsel for plaintiff in his brief herein and at oral argument in support of the assignment of error.

For the foregoing reasons, the court finds no reasons to reconsider or clarify the decision rendered herein on September 4, 1973, all matters raised by defendant having previously been considered by the court in rendering said decision. The motion for reconsideration is overruled.

Motion overruled.

TROOP, P. J., and HOLMES, J., concur.

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.
P. E. MASHETER,
DIRECTOR OF HIGHWAYS,
Appellee,

vs.

OHIO HOLDING COMPANY ET AL.,
Appellants.

1974 TERM
To wit: **February 28, 1974**

No. 73-1027

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS for Franklin County

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.
COSTS:
Motion Fee, $20.00, paid by Timothy J. Ucker.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this _____ day of _____ 19___

_____ Clerk

_____ Deputy

APPENDIX D
THE SUPREME COURT OF OHIO

The State of Ohio,
City of Columbus.
P. E. MASHETER,

Appellee,

vs.

OHIO HOLDING COMPANY ET AL.,

Appellants.

1974 TERM
To wit: **February 28, 1974**

No. 73-1027

APPEAL FROM THE COURT OF APPEALS
for Franklin County

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this _____ day of _____ 19___

_____ Clerk

_____ Deputy

APPENDIX E
CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 19, Article I, Ohio Constitution:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner. (See Const 1802, Art VIII, §4.)

REVISED CODE OF OHIO

§ 163.02 Appropriation of real property.

All appropriations of real property, except as otherwise authorized by this section, shall be made pursuant to sections 163.01 to 163.22, inclusive, of the Revised Code.

The director of highways may appropriate any interest in real property pursuant to sections 163.01 to 163.22, inclusive, of the Revised Code or as otherwise provided by law.

Where so authorized by sections 6101.01 to 6101.84, inclusive, of the Revised Code, a conservancy district may appropriate real property by procedures prescribed in such sections.

Where so authorized by sections 6115.01 to 6115.79, inclusive, of the Revised Code, a sanitary district may appropriate real property by procedures prescribed in such sections.

HISTORY: 131 v 130. Eff 1-1-66.

§163.03 Entry upon real property; notice; damages.

Any agency may, upon the notice prescribed in this section, prior to or subsequent to the filing of a petition pursuant to section 163.05 of the Revised Code, enter upon any lands, waters, and premises for the purpose of making such surveys, soundings, drillings, appraisals, and examinations as are necessary or proper for the purpose of the agency under sections 163.01 and 163.22, inclusive, of the Revised Code, and such entry shall not constitute a trespass. Notice of such proposed entry shall be given to the owner or the person in possession by such means as are reasonably available not less than forty-eight hours nor more than thirty days prior to the date of such entry.

The agency shall make restitution or reimbursement for any actual damage resulting to such lands, waters, and premises and to improvements or personal property located in, on, along, over, or under such lands, waters, and premises, as a result of such activities. If the parties are unable to agree upon restitution or other settlement,

damages are recoverable by civil action to which the state or agency hereby consents.

HISTORY: 131 v 180. Eff 1-1-66.

§ 163.06 Deposit by public agency.

(A) A public agency, other than an agency appropriating property for the purposes described in division (B) of this section, which qualifies pursuant to Section 19 of Article I, Ohio Constitution, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and thereupon take possession of and enter upon the property appropriated. The right of possession upon deposit as provided in this division shall not extend to structures.

(B) A public agency appropriating property for the purpose of making or repairing roads which shall be open to the public, without charge, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and stated in an attached declaration of intention to obtain possession and thereupon take possession of and enter upon the property appropriated, including structures situated upon the land appropriated for such purpose or situated partly upon the land appropriated therefor and partly upon adjoining land, so that such structures cannot be divided upon the line between such lands without manifest injury thereto. The jury, in assessing compensation to any owner of land appropriated under this division shall assess the value thereof in accordance with section 163.14 of the Revised Code. The owner or occupant of such structures shall vacate the same within sixty days

after service of summons as required under section 163.07 of the Revised Code, at no cost to the appropriating agency, after which time the agency may remove said structures. In the event such structures are to be removed before the jury has fixed the value of the same, the court, upon motion of the agency, shall:

(1) Order appraisals to be made by three persons, one to be named by the owner, one by the county auditor, and one by the agency. Such appraisals may be used as evidence by the owner or the agency in the trial of said case but shall not be binding on said owner, agency, or the jury, and the expense of said appraisals shall be approved by the court and charged as costs in said case.

(2) Cause pictures to be taken of all sides of said structures;

(3) Compile a complete description of said structures, which shall be preserved as evidence in said case to which the owner or occupant shall have access.

(C) Any time after the deposit is made by the public agency under division (A) or (B) of this section, the owner may apply to the court to withdraw the deposit, and such withdrawal shall in no way interfere with the action except that the sum so withdrawn shall be deducted from the sum of the final verdict or award. Upon such application being made the court shall direct that the sum be paid to such owner subject to the rights of other parties in interest provided such parties make timely application as provided in section 163.18 of the Revised Code. Interest shall not accrue on any sums withdrawable as provided in this division. (132 v H 188. Eff. 8-8-67. 132 v H 132, H 1, 131 v 94)

§ 163.09 Declaration of value and damages; time for assessment of compensation by jury; hearings.

(A) If no answer is filed pursuant to section 163.08 of the Revised Code, nor approval ordered by the court to a settlement of the rights of all necessary parties, the court on motion of a public agency shall declare the value of the property taken and the damages, if any, to be as set forth in any document properly filed with the clerk of courts by the public agency. In all other cases the court shall fix a time, within twenty days from the last date that such answer could have been filed, for the assessment of compensation by a jury.

(B) When an answer is filed pursuant to section 163.08 of the Revised Code, and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five nor more than fifteen days from the date the answer was filed to hear such questions. Upon such questions, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity. If as to any or all the property or other interest sought to be appropriated, the court determines the questions in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of such determination. An order of the court in favor of the agency on any of such questions or on qualification under section 163.06 of the Re-

vised Code, shall not be a final order for purposes of appeal. An order of the court against the agency on any of such questions, or on the question of qualification under section 163.06 of the Revised Code, shall be a final order for purposes of appeal. If a public agency has taken possession prior to such order and such order, after any appeal, is against the agency on any of such questions, the agency shall restore the property to the owner in its original condition or respond in damages, which may include the items set forth in division (B) of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents.

(C) When an answer is filed pursuant to section 163.08 of the Revised Code, and none of the matters set forth in division (B) of this section is specifically denied, the court shall fix a time within twenty days from the date the answer was filed for the assessment of compensation by a jury.

(D) If answers are filed pursuant to divisions (B) and (C) of this section, or an answer is filed on behalf of fewer than all the named owners, the court shall set the hearing or hearings at such times as are reasonable under all the circumstances, but in no event later than twenty days after the issues are joined as to all necessary parties or twenty days after rule therefor, whichever is earlier.

(E) The court may, with the consent of the parties, order two or more cases to be consolidated and tried together, but the rights of each owner to compensation, damages, or both shall be separately determined by the jury in its verdict.

(1969 H 1. Eff. 3-18-69. 132 v H 188, H 132; 131 v S 94)

§ 163.14 Jury verdict: how determined.

In appropriation proceedings the jury shall be sworn

to impartially assess the compensation and damages, if any, without deductions for general benefits as to the property of the owner.

The jury, in its verdict, shall assess the compensation for the property appropriated and damages, if any, to the residue, to be paid to the owners. When a building or other structure is on the property appropriated or when a building or other structure is situated partly upon the land appropriated and partly upon adjoining land so that the structure cannot be divided upon the line between such lands without manifest injury hereto, the jury, in assessing compensation to any owner of the land, shall assess the value thereof, as part of the compensation. The title to said structure shall vest in the agency which shall have the right to enter upon the adjoining land upon which any part of the structure is located for the purpose of removing said structure therefrom, after deposit in accordance with the verdict. Such removal shall be made within ninety days after taking title to the property appropriated; provided, that the court may extend removal time upon such conditions as the court requires.

The verdict shall be signed by at least three-fourths of the members of the jury.

If a jury is discharged without rendering a verdict, another shall be impaneled at the earliest convenient time and shall make the inquiry and assessment.

HISTORY: 131 v 186 (Eff. 1-1-66); 132 v H 132, §1. Eff. 8-8-67.

CITY CODE OF COLUMBUS, OHIO

3323.06 R-1 Residential District.

Within an R-1 area district no buildings or premises shall be used and no buildings shall be erected which are

arranged, intended or designed to be used for other than one or more of the following specified uses:

(a) Dwelling: Single-family residence together with such other buildings as are ordinarily appurtenant thereto; said residence shall have a minimum net floor area for living quarters above the lot grade line of fifteen hundred (1,500) square feet; shall not exceed thirty-five (35) feet in height; and shall be situated on a lot fifty (50) feet or more in width measured at the front lot line, except that on termini of cul-de-sacs the lot frontage may be reduced to not less than forty (40) feet, provided the lot width at the building line shall be not less than fifty (50) feet and said lot shall have an area of not less than seven thousand two hundred (7,200) square feet. Said lot shall front upon a public street, and provision shall be made for private access and off-street parking facilities as required in C. C. Chapter 3375.

For the purpose of this Zoning Code, the minimum net floor area for living quarters shall be computed for the floors in the dwelling above the lot grade line and excluding basements and attics. The second floor in each case qualifying for living quarters shall have access thereto by a permanent built-in stairway. In computing the minimum net floor area for living quarters, rooms for heating equipment or other utility purposes, outside vestibules and open or closed porches or verandas, and attached private garages, shall not be included. The term "living quarters" as used herein means that portion of the building which is constructed with ceilings

and walls finished on the inside in accordance with Titles Forty-one (41) and Forty-three (43) of the Building Code.

(b) Church, kindergarten if in connection with a public school on school grounds or if in connection with a church on church grounds, public and parochial school; provided, however, that the word "school" as used in this connection shall not include vocational or trade schools and schools for subnormal adults or children, and institutions other than those for children required by the laws of the State of Ohio to attend primary, secondary and high schools, as those terms are ordinarily used. Provision shall be made for private access and off-street parking facilities as required in C. C. Chapter 3375.

(c) Public park, public playground. Plans shall be approved by the Development Commission. (Ord. 1003-66.)

3331.06 C-4 Commercial District.

Within a C-4 Commercial District no buildings or premises shall be used and no buildings shall be erected which are arranged, intended or designed to be used for other than a use permitted in a C-1, C-2 or C-3 Commercial District, or one or more of the following specified uses:

(a) Automobile salesroom, bowling alley, book bindery, bicycle repair shop, cabaret, clothes pressing and cleaning (employing not more than three persons and using nonflammable liquids), custom shop, dance hall, fish market, frozen food locker, garage repair shop, ice house, job

printing, laundry (employing not more than three persons), private club, new and second-hand car lot, night club, plumbing shop, pool-room (conditional), poultry (killing and dressing for sale at retail on the premises), skating rink, stable (for not more than five animals), storage garage, supermarket, testing or experimental laboratory, tinsmith, tire repair shop, upholstery sales and shop, veterinary hospital (for small animals, not including outside runways);

(b) A use specified in this section within one hundred fifty feet of a residence or an apartment residence may be permitted by the Board of Adjustment.

(c) In a C-4 Commercial District a cabaret, dance hall, private club or poolroom shall not be located within five hundred feet of a church or a public or parochial school;

(d) A use specified in Chapter 3349 as a prohibited use shall not be permitted as an accessory use;

(e) In a C-4 Commercial District C. C. 3365.04 to 3365.07, inclusive, defining front yards and side yards in Commercial and Manufacturing Districts shall apply;

(f) Provisions shall be made for access, and off street parking and loading facilities as required by C. C. Chapter 3375. (Ord. 1083-71.)

APPENDIX F

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

P. E. MASHETER,
DIRECTOR OF HIGHWAYS

Plaintiff

v.

OHIO HOLDING COMPANY, ET AL.

Defendants.

Case No. 236922

JUDGMENT ENTRY ON JURY VERDICT

JUDGE SHOEMAKER

This cause came on duly to be heard for the determination of compensation of land taken and assessment of damages to the residue. Thereupon, a jury was impanelled and sworn; and such issues as to compensation and damages were duly submitted to said jury. Thereupon, after due deliberation, said jury returned a verdict of Six Hundred Eight Thousand Dollars and No Cents ($608,000.00) as compensation for land taken, and Fifty Thousand Dollars and No Cents ($50,000.00) as damages to the residue, including limitation of access, such verdict thus being for the total sum of Six Hundred Fifty Thousand Dollars and No Cents ($658,000.00).

It is therefore ORDERED, ADJUDGED and DECREED that the said proceedings be and the same are hereby approved and confirmed by the Court, and that the Director of Highways of the State of Ohio shall deposit with this Court a sum sufficient, to-wit: Four Hundred Thirty Three Thousand Five Hundred Forty-Nine Dollars and No Cents ($433,549.00) which when added to the original deposit herein, to-wit: Two Hundred Twenty-

Four Thousand Four Hundred Fifty-One Dollars and No Cents ($224,451.00) will equal the said sum of Six Hundred Fifty-Eight Thousand Dollars and No Cents ($658,000.00) which shall be held by the Clerk for the landowners herein as their interests may appear in an order for distribution to be made upon final determination of this cause.

Further in conformity with these proceedings, it is ORDERED, ADJUDGED and DECREED that the fee simple title and easement for highway purposes over and upon the premises described in the Amended Petition filed herein, the same being located and more particularly described as follows:

In the City of Columbus, Section 14, Town 12 North, Range 21 west, Refugee Lands, Franklin County, Ohio, lying on the left and right sides of the centerlines of surveys made by the Department of Highways, and recorded in Volume 41, Pages 9, 10, of the records of Franklin County, Ohio, and being more fully described as follows:

PARCEL NO. 179-WL (HIGHWAY)
ALL RIGHT, TITLE AND INTEREST IN FEE SIMPLE IN THE FOLLOWING DESCRIBED PROPERTY

Beginning at a point from which a railroad spike bears north 9 degrees 07 minutes 14 seconds east a distance of 0.04 feet, said point being 395.01 feet left of and at right angles from Station 1111 plus 79.09 in the centerline of a survey made in 1961 by the Ohio Department of Highways for Interstate 270 (FRA-270-32.00 N) and said point being in owners northwest property corner, the northeast corner of the Brook Grove Inc., property, the southerly line of the Arthur V. and Ethel G. Phalor property, and in the line between Section 11 and Section 14; thence along

owners northerly property line, said Phalor's southerly property line and said section line south 85 degrees 45 minutes 05 seconds east a distance of 444.48 feet to an angle point in said line, passing said Interstate 270 centerline at a distance of 396.42 feet at Station 1112 plus 12.43; thence continuing along said property line, section line and the southerly line of the State of Ohio (Hali Construction Co. Inc.) property, south 85 degrees 37 minutes 02 seconds east a distance of 305.97 feet to a point in the southeast corner of the said State of Ohio property and in the proposed easterly limited access right of way line for said Interstate 270; thence along said limited access right of way line the following three (3) courses and distances: South 32 degrees 01 minute 34 seconds east a distance of 819.20 feet to a point; thence south 56 degrees 52 minutes 20 seconds east a distance of 216.33 feet to a point; thence south 85 degrees 09 minutes 42 seconds east a distance of 208.91 feet to a point in owners easterly line and the westerly line of the Biltwell Homes Inc. property; thence along said property line south 3 degrees 34 minutes 33 seconds west a distance of 110.63 feet to a point in the center of existing U. S. Route 40 (East Main Street), owners southeast corner, the southwest corner of said Biltwell Homes Inc. property, the northwest corner of the Davis Investment Co. property and the northeast corner of the Frankfield Inc. et al., property; thence along owners southerly property line, said Frankfield Inc., et al., northerly property line, the northerly line of the Mariemont Inc. property and the center of existing U. S. Route 40 (East Main Street) south 89 degrees 26 minutes 16 seconds west a distance of 1701.22 feet to a point in owners southwest corner, the southeast corner of another tract of Davis Investment Co, passing the centerline

of said Interstate 270 at a distance of 1326.56 feet at Station 1102 plus 19.26 in said centerline; thence along owners westerly line and the easterly property line of the last mentioned property of said Davis Investment Co. North 1 degree 37 minutes 01 second east a distance of 500.52 feet to a point in the northeast corner of the last mentioned property of said Davis Investment Co. and the southeast corner of said Brook Grove Inc. property; thence continuing along owners westerly property line and said Brook Grove Inc. easterly property line the following three (3) courses and distances: North 1 degree 38 minutes 58 seconds east a distance of 157.13 feet to a point; thence north 22 degrees 38 minutes 27 seconds east a distance of 253.76 feet to a point; thence north 9 degrees 07 minutes 14 seconds east a distance of 123.80 feet to the point of beginning, containing 26.49 acres, more or less, inclusive of the present road which occupies 1.56 acres, more or less.
The description for this parcel is based on a field survey made by O. W. Gruebmeyer, Registered Surveyor No. 771.

Owner claims title by deed recorded in the records of Franklin County, Ohio, Deed Book 2305, Page 26.

Together with all rights or easements of access to or from said limited access highway, from or to the land of said persons abutting upon that portion of said limited access highway, as shown by the plans of said improvement herein referred to. Said stations being the station numbers as stipulated in the hereinbefore mentioned survey.

PARCEL NO. 179-T (TEMPORARY)

TEMPORARY RIGHT TO ENTER UPON THE FOLLOWING DESCRIBED LAND TO CON-

STRUCT AND USE A DETOUR DURING THE PERIOD OF CONSTRUCTION AND UNTIL SAID IMPROVEMENT IS OPENED TO TRAFFIC IN ACCORDANCE WITH PLANS AND SPECIFICATIONS PREPARED BY THE OHIO DEPARTMENT OF HIGHWAYS

Beginning at a point in the northeast corner of the parcel herein intended to be described, being in the owners easterly property line and the westerly line of the Biltwell Homes Inc. property, said point being 122.10 feet left of and at right angles from Station 63 plus 32.05 in the centerline of a survey made in 1967 by the Ohio Department of Highways for East Main Street (U. S. 40) (FRA-270-32.00 N); thence southerly along owners easterly property line to a point 110.22 feet left of and at right angles from Station 63 plus 31.30 in said centerline, said point being in the northerly proposed limited access right of way line for East Main Street; thence westerly along said right of way line to a point 129.87 feet left of and at right angles from Station 61 plus 23.32 in said centerline; thence northwesterly to a point 249.85 feet left of and at right angles from Station 59 plus 43.31 in said center line; thence easterly to a point 140.00 feet left of and at right angles from Station 61 plus 50.00 in said centerline; thence easterly to the point of beginning, containing, 0.11 of an acre, more or less. The description for this parcel is based on a field survey made by Robert G. Watts, Registered Surveyor No. 4138,

be and the same hereby are duly vested in the State of Ohio, free and clear of all claims of the owners of said lands and persons having an interest therein, to-wit:

Ohio Holding Company 42 East Gay Street
Statutory Agent
Auditor of Franklin County, Ohio, Columbus, Ohio
Treasurer of Franklin County, Ohio, Columbus, Ohio

It is further ORDERED that a certified copy of this Entry be transmitted to the County Auditor for the purpose of making the proper notations relative to transfer of title, if any, and changes of tax valuation and liability therefor, if any; that the County Auditor transmit same to the County Recorder for recording in the Deed Records of this County; that the landowners pay from this deposit any taxes required to be paid pursuant to law; and that the Director of Highways of the State of Ohio pay all court costs herein accrued; and that a record be made of these proceedings according to law.

Fred J. Shoemaker /s/
Fred J. Shoemaker, JUDGE

APPROVED:
WILLIAM J. BROWN /s/
WILLIAM J. BROWN
Attorney General
DONALD J. GUITTAR /s/
DONALD J. GUITTAR
Chief, Transportation Section
Assistant Attorney General

By RALPH C. GODWIN /s/
Ralph C. Godwin
Assistant Attorney General

LUCAS, PRENDERGAST, ALBRIGHT,
GIBSON, BROWN & NEWMAN
By ROBERT E. ALBRIGHT /s/
ROBERT E. ALBRIGHT
Attorneys for Landowner

SUPREME COURT, U. S.
JUL 13 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1787

OHIO HOLDING COMPANY
Petitioner,

v.

P. E. MASHETER, DIRECTOR
OF HIGHWAYS, STATE OF OHIO
Respondent.

Brief in Opposition to Petition for Certiorari

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Attorney General
State of Ohio

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Assistant Attorney
General
Chief, Transportation
Section

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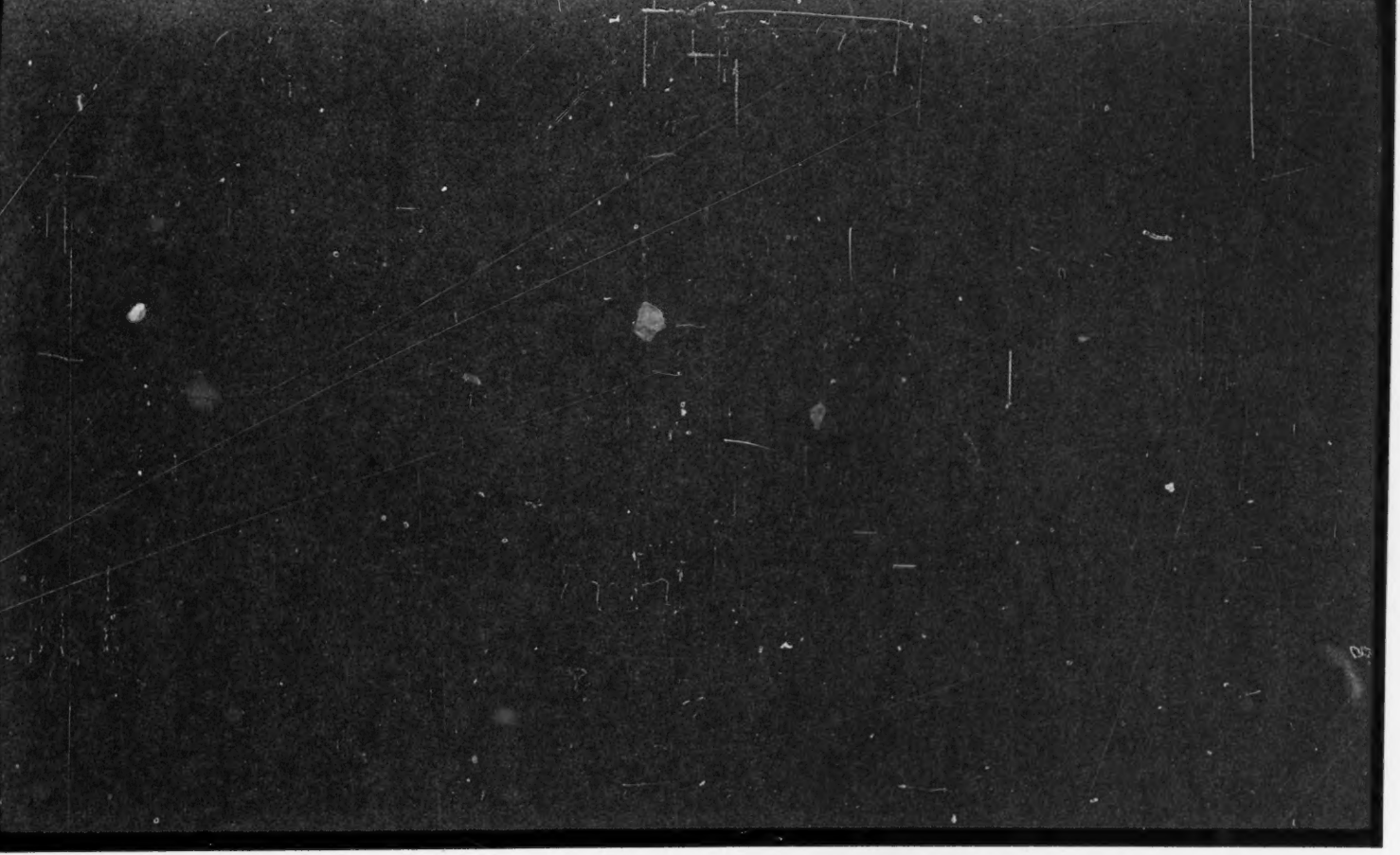

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1787

OHIO HOLDING COMPANY,
Petitioner,

v.

P. E. MASHETER,
DIRECTOR OF HIGHWAYS, STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

OPINIONS BELOW

The Supreme Court of Ohio wrote no opinion, however an order denying certiorari was filed by that court on February 28, 1974. The Court of Appeals for Franklin County, Ohio rendered a written decision which is attached as Appendix A, Petitioner's Brief, pp. 23-39 and which was reported at 38 Ohio App. 2d 49, ... N.E. 2d ..... (1974). On October 9, 1973, the Court of Appeals on reconsideration rendered a written unreported decision overruling the motion for reconsideration. Such decision is attached as Appendix B, Petitioner's Brief, pp. 40-42.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

The questions as presented by the Petitioner are not entirely descriptive of the real questions in the instant case. The two questions presented are:

1. Should the Court take jurisdiction of this matter where the Petitioner alleges that the possible application of a principle of evaluation as announced by the Supreme Court of Ohio in a case to which Petitioner was not a party (*Masheter v. Wood*, 36 Ohio St. 2d 175, 305 N.E. 2d 785 (1973)), will result in a denial of due process in the retrial of the within action?

2. May an expert appraisal witness in an eminent domain proceeding testify as to his opinion of the probability of a zoning change when such testimony would constitute speculation as to future administrative or legislative action?

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the following relevant constitutional and statutory provisions are contained in Petitioner's Brief (Appendix E, pp. 45-54):

Fourteenth Amendment to the Constitution of the United States; Section 19, Article I, Ohio Constitution; Sections 163.02, 163.03, 163.06, 163.09, 163.14 of the Revised Code of Ohio; Sections 3323.06 and 3331.06 of the Columbus City Code.

STATEMENT OF THE CASE

The petitioner, Ohio Holding Company, an Ohio corporation, was the owner of 30.617 acres of land located on the north side of East Main Street (U.S. Route 40) between Noe-Bixby Road to the west and McNaughten Road to the east, in the City of Columbus, Franklin

County, Ohio, on July 14, 1969, which was the agreed date of take.

From this plat of ground, the respondent, P. E. Masheter, Director of Highways, State of Ohio, by authority of Chapter 163, Revised Code of Ohio, appropriated 26.49 acres, including 1.56 acres presently occupied by East Main Street in fee simple including limited access, for the construction of Interstate 270, the Columbus Outerbelt, leaving a residue of 4.127 acres.

The part of the property taken was zoned R-1 Single Family Residential by the City of Columbus on the date of take. The residue, which abutted the northeast side of the ramp leading from East Main Street to I-270, was zoned C-4 Commercial by the City on May 29, 1968.

Prior to the appropriation the area along East Main Street, between Noe-Bixby Road and McNaughton Road was undeveloped in the vicinity of the subject property, except for a filling station, tavern and garage operated as a non-conforming use.

The subject property was included in an application to the City of Columbus to change the zoning on 91 acres from R-1 Single Family District to C-4 Commercial, Case Z 66142. On November 9, 1966, the Development Commission of the City of Columbus issued its report and recommended that the application by denied.

The sum of $224,451.00 was deposited by respondent Director of Highways with the Clerk when this case was filed in the Common Pleas Court of Franklin County, Ohio. The case was tried before a jury which rendered a verdict in the amount of $608,000.00 compensation, $50,000.00 damages, a total of $658,000.00, and a judgment in this amount was filed March 7, 1973.

Upon appeal by the respondent, the Court of Appeals of Franklin County, Ohio, correctly reversed this judgment

and ordered a new trial because the trial court erred in its refusal to strike the testimony of the petitioner's expert real estate witness, George Little. Mr. Little's testimony should have been stricken in that he based his valuation of the land on a higher use than that permitted under the then existing zoning regulations. In addition, the Court of Appeals reversed because the trial court failed to instruct the jury as to the consideration which should be given to the existing zoning in determining compensation.

The petitioner's motion to certify the record was denied by the Ohio Supreme Court. Also, the Ohio Supreme Court overruled the appeal of petitioner as a matter of right finding no substantial constitutional questions of law.

ARGUMENT

A. TO ALLEGE THAT THE POSSIBLE APPLICACATION OF A PRINCIPLE OF EVALUATION AS ANNOUNCED BY THE SUPREME COURT OF OHIO IN ANOTHER CASE (MASHETER v. WOOD, 36 OHIO ST. 2d 175, 305 N.E. 2d 785 (1973)), WOULD RESULT IN A DENIAL OF DUE PROCESS IS TO CREATE AN ISSUE WHICH IS NOT RIPE FOR ADJUDICATION.

It is clear that the United States Supreme Court does not render advisory opinions. *Muskrat v. United States,* 219 U. S. 346 (1911). To adjudicate a constitutional issue, a concrete legal issue, which is not presented as an abstraction, is required. *United Public Workers of America v. Mitchell,* 330 U. S. 75 (1947). The present case is not ripe for adjudication. There has been no injury suffered herein. *Socialist Labor Party et. al v. Gilligan,* 406 U.S. 583 (1972).

In the present cause, the petitioner has sought to have this Court adjudicate an issue which is hypothetical

in nature. The petitioner has alleged that at a retrial it will be denied due process of law if the rule of evaluation of *Masheter v. Wood*, 36 Ohio St. 2d 175, 305 N.E. 2d 785 (1973) is applied. To decide this issue this Court would be forced to speculate if such principle of evaluation would in fact be applied, how it would be applied, and even if it were applied, whether it would result in an unfavorable verdict to the petitioner. The injury of which the petitioner complains has not occurred and may never occur. "Determination of the scope and constitutionality of [principles of evaluation] in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *International Longshoremen's Union v. Boyd*, 347 U. S. 222, 224, (1954).

The petitioner should be unable to litigate the question of whether the application of *Masheter v. Wood, supra*, at a retrial would result in a taking of property without due process until such time as that rule of evaluation is applied. If, at that time, the petitioner should seek review before this honorable Court, then the Court would have a complete record of the controversy which would be appropriate for adjudication. The issue as presented by petitioner results in a hypothetical question, and it is one which is not ripe for adjudication.

B. AN EXPERT APPRAISAL WITNESS IN AN EMINENT DOMAIN PROCEEDING MAY CONSIDER USES OF THE PROPERTY BEING APPROPRIATED OTHER THAN THOSE PERMITTED UNDER PRESENT ZONING RESTRICTIONS, BUT THE EXPERT WITNESS MAY NOT TESTIFY AS TO HIS OPINION OF THE PROBABILITY OF A ZONING CHANGE FOR THE REASON THAT SUCH TESTI-

MONY CONSTITUTES SPECULATION AS TO FUTURE ADMINISTRATIVE OR LEGISLATIVE ACTION. A REFUSAL TO ADMIT SUCH SPECULATIVE EVIDENCE DOES NOT DEPRIVE AN OWNER OF HIS PROPERTY WITHOUT DUE PROCESS.

The Appellate Court, in its decision of September 4, 1973 (Appendix A, Petitioner's Brief, pp. 23-39), held that an expert appraisal witness, in a land appropriation proceeding may consider uses of the land higher than those presently permitted under zoning regulations when testifying to the fair market value of the land being appropriated. However, such a witness, the court held, may not speculate as to the probability of a zoning change or amendment, nor may the witness ignore the present zoning laws and restrictions and base his testimony solely on a use not permitted by law. Such decision reflects the law of evaluation in the State of Ohio, *Masheter v. Wood*, 36 Ohio St. 2d 175, 305 N.E. 2d 785 (1973); *Sowers v. Schaeffer*, 155 Ohio St. 454, 99 N.E. 2d 313 (1951), and does not result in a taking of the petitioner's property without due process of law.

The rule of evaluation in eminent domain proceedings as set forth by the Supreme Court of Ohio is well-formulated and well-defined. The main principle of evaluation is found at paragraph three of the syllabus of *Sowers v. Schaeffer*, 155 Ohio St. 454, 99 N.E. 2d 313 (1951);

> The rule of valuation in a land appropriation proceeding is not what the property is worth for any particular use but what it is worth generally for any and all uses for which it might be suitable, including the most valuable uses to which it can reasonably and practically be adapted.

This standard has been subsequently approved and followed by the Ohio Supreme Court. *E.g. Thormyer v. Joseph Evans Ice Cream Co.*, 167 Ohio St. 463, 150 N.E. 2d 30 (1958); *Ohio Turnpike Commission v. Ellis*, 164 Ohio St. 377, 131 N.E. 2d 397 (1955). However, in the case of *Board of County Commissioners v. Thormyer*, 169 Ohio St. 291, 159 N.E. 2d 619 (1959), (hereafter referred to as *Thormyer)* the Supreme Court of Ohio expanded the standard set forth in *Sowers, supra.* In paragraph one of the *Thormyer* syllabus it is stated:

> In determining the value of land in an appropriation proceeding, the question to be determined is the worth of the property for any and all uses for which it may be suitable, including the most valuable uses to which the land can *lawfully*, reasonably and practically be adapted.
> [Emphasis added.]

Thus, *Thormyer*, added "lawfully" to the standard of evaluation announced in *Sowers, supra*, and indicated that the uses to be considered in the evaluation of land were those permitted under the existing zoning laws.

It is important to note that the *Thormyer* case involved deed restrictions limiting the use of the land to the maintenance of a children's home. In regard to determining the fair market value of this land, the Ohio Supreme Court delineated three courses of action as to what consideration should be given the deed restrictions. First, no consideration could be given to the deed restrictions which would result in a windfall to the landowner. Second, full consideration could be given to the deed restrictions which would result in a windfall to the appropriator. Third, consideration could be given to the deed restrictions balanced with consideration for the chance of having the deed restrictions removed by legislative or other action. 169 Ohio St. at 295. This third alternative was rejected as being too vague and too speculative. 169 Ohio St. at 298.

The Court, in *Thormyer*, decided to disregard the deed restrictions in order to determine the fair market value. This determination was based upon the theory that since the specified purpose of the donor could not possibly be fulfilled, then the Court would strive to implement the general intent of the donor under the doctrine of *cy-pres*. The Court found that the donor had not foreseen that the land would be appropriated for other uses, and, had he foreseen this, he would not have wished the deed restrictions to result in a benefit to the appropriator. 169 Ohio St. at 300.

It cannot be seriously argued that *Thormyer* supports the position that present zoning restrictions may be disregarded when determining the market value of land. There are obvious distinctions between the public policy purposes of zoning and the donor's intent as reflected in deed restrictions. Deed restrictions are the result of one person's desire for the disposition of his property reflecting the personal preferences or philanthropic nature of a single individual. Generally there is little regard to surrounding property. Zoning, on the other hand, is a comprehensive, well-planned system in the interests of the public-at-large and subject to legislative enactment and a valid exercise of the police power.

That the enlarged rule of *Thormyer* has been followed in Ohio is supported by *In Re Appropriations for Highway Purposes*, 20 Ohio St. 2d 43, 252 N.E. 2d 643 (1969), where the Ohio Supreme Court in a *per curiam* opinion stated that paragraph three of the syllabus of *Sowers v. Schaeffer*, *supra* and the *Thormyer* case were controlling. Even though that court quoted the *Sowers v. Schaeffer* syllabus instead of the *Thormyer* syllabus, the word "lawfully" was not eliminated from the test of highest and best use. This is indicated by the fact that the court cited *Thormyer* as authority in support of the *Sowers* case.

The Supreme Court of Ohio has very recently clarified the case law in this area in *Masheter v. Wood, supra,* wherein the syllabus states:

> In a land appropriation proceeding, opinion testimony of an expert appraisal witness as to the reasonabale probability of a zoning change to higher and more valuable use classification is not competent, for the reason that such testimony constitutes speculation as to future administrative or legislative action.

After stating that the rule of valuation in a land appropriation proceeding in Ohio is that which was announced in *Sowers v. Schaeffer, supra,* as enlarged by the word "lawfully" in *Board of County Commrs. v. Thormyer, supra,* the court then stated at page 177:

> This addition to the rule would seem to exclude uses which are prohibited by zoning regulations, from consideration in determining the highest and best use to which land may be adopted.

The *Wood* Court also noted that to hold that speculation as to the probability of a zoning change is incompetent is compatible with *Masheter v. Hoffman,* 34 Ohio St. 2d 213, 298 N.E. 2d 142 (1973), which stated that each case must be considered on its own facts. The opinion in *Wood,* at page 178, states:

> An expert witness may testify as to these factors within his particular knowledge and expertise which would indicate the likelihood of a zoning change, such as a change in land use in the area, prior rezoning activities, or sales prices of comparable properties which are higher than their present use would justify. However, he may not give his opinion as to the probability of a zoning change. Such an opinion constitutes speculation upon the probability of future decisions of a zoning board or a legislative body. Therefore, such expert may not testify as to his opinion upon the probability of a zoning change.

Under the *Wood* holding, an expert appraisal witness may testify to those facts which indicate a likelihood of a change in zoning that affects the fair market value under present zoning conditions. That is, he may testify to what a willing buyer would pay a willing seller, in anticipation of a future rezoning, under the present zoning conditions. But the expert appraisal witness cannot specifically state that a rezoning is imminent and base his valuation on a higher use than that permitted by present law.

Thus, as in the instant cause, where each expert appraisal witness agreed that the highest and best use of the property under the existing zoning was to hold in anticipation of a future rezoning, the expert appraisal witness may testify to those facts which would induce a willing buyer to pay a willing seller more than the market value than is justified under the present residential zoning classification. The fair market value, then, must be the value of the land for residential purposes under the existing zoning (plus some value representing the anticipation that the property might be rezoned). The added value would be determined by the risk involved in holding the property for a more valuable use in the future.

However, in the instant case, the landowner's expert appraisal witness completely disregarded the existing zoning and testified that he found the highest and best use to be commercial, not to hold in anticipation of rezoning. Since this testimony was based upon the value of the property for uses not allowed under existing zoning, the appellate court was correct in reversing the trial court which admitted the evidence. This testimony is incompetent under the *Wood* rationale in that the witness based his valuation on sales of lands zoned commercial at present and not on sales of comparable residential land whose sale prices are higher than their present zoning use would justify. Thus, where, as in this case, upon cross-examination it

is determined that an expert appraisal witness has based his valuation of land on a use higher than that permitted by existing zoning restrictions, and where the witness ignores the present zoning laws, then, the court is correct in striking such testimony under *Masheter v. Wood*. To do so does not deprive an owner of its property without due process of law.

Because the Supreme Court of Ohio has spoken decisively and effectively in *Masheter v. Wood, supra,* stating the rule of evaluation to be that of *Sowers v. Schaeffer, supra,* as enlarged by *Board of County Commissioners v. Thormyer, supra;* because the *Wood* decision delineates what testimony concerning future rezoning is competent; and, because the petitioner has failed to show how it has been denied due process of law, it is not necessary for this Court to grant the petition for certiorari.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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